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Supreme Court, U.S.
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No. 89-1776

In The

Supreme Court of the United States

October Term, 1989

MICHAEL R. FONTHAM,

Petitioner,

versus

COMMITTEE ON PROFESSIONAL RESPONSIBILITY,
LOUISIANA STATE BAR ASSOCIATION,

Respondent,

Brief In Opposition To Petition For Certiorari

G. Fred Ours
Assistant Disciplinary Counsel
Counsel of Record

James R. Barrow
Chief Disciplinary Counsel

601 St. Charles Avenue
New Orleans, Louisiana 70130
Phone: (504) 566-1600

Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

May an attorney be disciplined for an improper attempt, by the attorney, to influence a State Supreme Court's decision in a civil case by means outside that states Code of Civil Procedure?

LIST OF PARTIES TO THE PROCEEDING

Michael R. Fontham

The Disciplinary Board of the Louisiana State Bar Association, as successor to the Committee on Professional Responsibility, Louisiana State Bar Association

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Cases:

Cajun Electric Power Cooperative, v. Louisiana Public Service Commission, 532 So.2d 1372 (La. 1988), revised on rehearing 544 So.2d 362 (La. 1989)..... 13

In addition, the case law is discussed in the Committee on Professional Responsibility's Supplemental Brief which is attached to Petitioner's Brief at pages APP 9 through APP 29.

OPINION BELOW

The opinions below are noted in Petitioner's Brief and are reproduced at Appendix A, pages A-1, and Appendix B, commencing at page A-2, of the Petitioner's Brief. These opinions are unpublished opinions by the Louisiana Supreme Court and its disciplinary arm.

JURISDICTION

Jurisdiction to Review the judgment of the Louisiana Supreme Court by Writ of Certiorari is conferred by 28 U.S.C. 1257 (a) and Rule 10.1 (C) of the United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States Amendment X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Rule 8.4 (d) of the Louisiana State Bar Association Rules of Professional Conduct provides:

> It is professional misconduct for a lawyer to:
> (d) Engage in conduct that is prejudicial to the administration of justice.

Louisiana Code of Civil Procedure, Art. 151, provides:

> Art. 151. Grounds
>
> A. A judge of any court, trial or appellate, shall be recused when he

is a witness in the cause.

B. A judge of any court, trial or appellate, may be recused when he

(1) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause;

(2) At the time of the hearing of any contested issue in the cause, has continued to employ, to represent him personally, the attorney actually handling the cause (not just a member of that attorney's firm), and in this case the employment shall be disclosed to each party in the cause;

(3) Has performed a judicial act in the cause in another court;

(4) Is the spouse of a party, or of an attorney employed in the cause; or is related to a party, or to the spouse of a party, within the fourth degree; or is related to an attorney employed in the cause; or to the spouse of the attorney, within the second degree; or

(5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.

> C. In any cause in which the state, or a political subdivision thereof, or a religious body or corporation is interested, the fact that the judge is a citizen of the state or a resident of the political subdivision, or pays taxes thereto, or is a member of the religious body or corporation, is not a ground for recusation.

Louisiana Code of Civil Procedure, Art. 159, provides:

> Art. 159. Recusation of supreme court justice
>
> When a written motion is filed to recuse a justice of the supreme court, he may recuse himself or the motion shall be heard by the other justices of the court.
>
> When a justice of the supreme court recuses himself, or is recused, the court may (1) have the cause argued before and disposed of by the other justices, or (2) appoint a judge of a district court or a court of appeal having the qualifications of a justice of the supreme court to act for the recused justice in the hearing and disposition of the cause.

STATEMENT OF THE CASE

Petitioner was privately reprimanded by letter dated February 28, 1990. The substance of that reprimand details the misconduct involved and is reproduced here for the reader's convenience.

> That in your capacity as Attorney at Law, you were representing the Louisiana Public Service Commission before the Supreme Court of Louisiana in a matter entitled Cajun Electric Power Cooperative, Inc. v. Louisiana Public Service Commission, docket number 88 -CA-1719. That following the issuance of the Supreme Court opinion, and while an application for rehearing was pending before the Court, you did , on or about December 7, 1988, deliver to the Clerk of the Supreme Court of Louisiana a letter relating to Justice Cole's participation in the above detailed case which you did request that the Clerk of Court transmit to the Court. A copy of said letter is hereby attached and incorporated herein as if copied in extenso. That a

copy of your letter was provided to a member of the press and as a result the content of the letter was disclosed in the Baton Rouge Morning Advocate. That you did not forward to the Court, either with your letter of December 7, 1988 or subsequently, a Motion to Recuse Justice Cole pursuant to La. C.C.P. Arts. 151 and 159. That the combined effect of the public disclosure of the contents of your letter, combined with the fact that no Motion to Recuse was filed, resulted in a situation where the impartiality of a Supreme Court Justice has been called into question without the opportunity for a hearing and decision on the merits of that issue as provided for in La. C.C.P. Arts. 151 and 159. That you have engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4 (d) of the Rules of Professional Conduct of the Louisiana State Bar Association.

SUMMARY OF THE ARGUMENT

I

Petitioner's misconduct does not involve protected speech. Communications which are intended to improperly influence a court in deciding a case, and which are made outside of the procedures established for raising issues before a court, are not protected speech.

II

Petitioner's statement that the letter involved is factual and accurate is nct established by the record herein. Since no motion to recuse was filed, no hearing was held on the allegaticns of fact, the conclusions implied or

inferences to be drawn in Petition's letter. There is no finding by any finder of fact establishing whether the allegations, conclusions, or inferences involved in the letter are true or not true.

III

Any inference that the content of the letter involved herein was somehow instrumental in righting a wrong or correcting a miscarriage of justice is erroneous and should be disregarded. The reversal of the underlying civil case by the Louisiana Supreme Court on rehearing turned on issues of law and not upon a revelation contained in Petitioner's letter.

ARGUMENT

Petitioner characterized this matter as a case of unwarranted infringement upon his first amendment free speech rights. This is not the case. All speech is not protected speech. Certain types of speech, which seek to improperly influence a public official's conduct, are in fact clearly illegal and can be subject to criminal sanctions. Bribery, blackmail, and extortion are examples of such unprotected speech. This is not to imply or infer that Fontham's letter constitutes bribery, blackmail, extortion, or any other criminal conduct. Clearly, that is not the case. However, Fontham's letter was intended to influence the Louisiana Supreme Court's decision on Fontham's

pending Application For Rehearing in a case that was very important to Fontham's client, the Louisiana Public Service Commission.

Petitioner admits that the intent behind the letter was to influence the remaining Louisiana Supreme Court Justices vis-a-vis Justice Cole's opinions in this case. See Petition For A Writ of Certiorari, page 7, wherein Petitioner states:

> Nevertheless, the Commission and counsel were concerned that the other members of the court should be aware of Justice Cole's relationship with Mr. Harbour in the deliberations concerning the rehearing application. In those deliberations, Justice Cole presumably would share his views with other justices. Mr. Fontham and those he consulted believed that the Commission was entitled to be ensured that all

> members of the court were aware of the relevant circumstances in considering the rehearing application.

See also Petition For A Writ Of Certiorari, page 18, wherein Petitioner states:

> The Committee tried to justify its reprimand by claiming that the statements were punishable since they were not made in a motion for recusal. But Fontham did not seek to force the recusal of Justice Cole, who already had participated in the case. A motion for recusal would likely have caused embarrassment to the court and would have required a showing of actual bias. Fontham sought to make the entire court aware of the relevant facts, since Justice Cole's participation in deliberations could affect the views of the other justices in deciding the merits.

These statements, the text of, and the context surrounding the letter delivered to the Court by Fontham, make it

clear that the intent behind the letter was to convince six of the seven Louisiana Supreme Court Justices that Justice Cole was improperly biased in this case and that his views should be disregarded. It should be noted that the original decision was by a four to three vote with Justice Cole in the majority. Fontham's application for rehearing was pending before the Louisiana Supreme Court at the time the letter was delivered.

It is also clear that a conscious decision was made not to file a motion to recuse Justice Cole because Fontham could not prove grounds for recusal under La. C.C.P. Art. 151 (reproduced supra). Having determined that he could not prove that Justice Cole was actually biased in the matter, Fontham, nevertheless, sought

to convince six of the justices of the Louisiana Supreme Court that Justice Cole was biased by means of the offending letter. The letter is a blatant attempt to influence the Louisiana Supreme Court's judgement in a case before that court by means outside the procedures set forth in Louisiana law. Clearly, a state has the right to establish procedures to insure that legal matters in its court s proceed in an orderly manner. Louisiana has a right to set forth the grounds for which its judges can be recused. La. C.C.P. Art. 151 (reproduced supra) does so in a reasonable manner. Art. 151 applies to Louisiana Supreme Court Justices. See La. C.C.P. Art. 159. The recusation procedures adopted by the Louisiana Legislature provide for the filing of a Motion To Recuse, and for a hearing to

give the mover an opportunity to prove his allegations. Fontham, knowing that he could not prove grounds for recusal, sought to circumvent the orderly administration of justice in an attempt to improperly influence the Louisiana Supreme Court's decision on a case pending before it. Such speech is not protected speech.

II

Petitioner contends that his statements in the offending letter are true, factual, and accurate. This assertion is not established by the record herein. Fontham chose not to file a motion to recuse because he could not prove that Justice Cole was actually biased. Thus, by Petitioner's own choice, he avoided the hearing called for in the Louisiana Code of Civil Procedure. Since

there was no hearing on Fontham's statements contained in the offending letter, there is no finding establishing whether those statements are true, accurate, and factual or not. Absent such a finding, the truth, accuracy, or factual basis for such statements cannot be assumed.

III

Justice Cole was not removed from the case by the other justices following receipt of the letter by the Court. The Court did not consider the letter to be a Motion To Recuse. See Appendix A, a letter from the Clerk of the Louisiana Supreme Court contained in the record of this matter before the Louisiana Supreme Court, as Exhibit F, to the Committee on

Professional Responsibility's Opposition To Appeal.

A review of the original decision by the Louisiana Supreme Court, and the decision on rehearing [Cajun Electric Power Cooperative, Inc. v. Louisiana Public Service Commission, 544 So.2d 1372 (La. 1988), Reversed on rehearing, 544 So.2d 362 (La. 1989)] establishes that the reversal, by a split court, turns on issues of Louisiana Constitutional and statutory interpretation and not upon any supposed bias of a member of the Court.

Justice Cole participated in both the original decision and the decision on rehearing, wherein he dissented in part, concurred in part, and assigned reasons. There is nothing in the rehearing opinion which indicates that the Louisiana

Supreme Court found any injustice or any impropriety on Justice Cole's part in the rendering of the original decision. The reversal was based upon points of law.

Any inference that the content of Fontham's letter caused the Louisiana Supreme Court to conclude that its original decision was somehow unjust, or that Justice Cole's participation was somehow improper is unwarranted. There is nothing in the record which suggests that the Louisiana Supreme Court granted rehearing to right some wrong, or to correct a miscarriage of justice. Any such inference is erroneous and should be disregarded.

CONCLUSION

The letter involved in this case is an improper attempt to circumvent the orderly administration of justice and to improperly influence the decision of a court of law in a matter pending before that court. This is not a case of a lawyer being disciplined for exercising his right to speak freely. The speech involved is not protected. It would be improvident to grant the writ.

Repectfully submitted,

G. Fred Ours
Assistant Disciplinary Counsel
Counsel of Record

James R. Barrow
Chief Disciplinary Counsel

601 St. Charles Avenue
New Orleans, Louisiana 70130
Attorneys for Respondent

APPENDIX

APPENDIX A

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

CHIEF JUSTICE
JOHN A. DIXON, JR.
ASSOCIATE JUSTICES
PASCAL F. CALOGERO, JR.
WALTER F. MARCUS, JR.
JAMES L. DENNIS
JACK GROZIER WATSON
HARRY T. LEMMON
LUTHER F. COLE
CLERK OF COURT
FRANS J. LABRANCHE, JR.

May 17, 1989

301 LOYOLA AVE., 70112
TELEPHONE 504-568-5707

G. Fred Ours
Louisiana State Bar Association
601 St. Charles Ave.
New Orleans, LA 70130

Re: Letter from Michael Fontham

Dear Fred:

Concerning your inquiry in the matter Cajun Electric Power Cooperative, Inc., et al vs. The Louisiana Public Service Commission, No. 88-CA-1719, during the time the case was pending on an application for rehearing, a letter was received from Michael Fontham concerning Justice Cole's participation in the case. On December 7, 1988, that letter was filed and circulated to the Court. The letter was not accompanied by a motion to recuse and the letter itself was not written in such a manner as to be considered a motion.

Within a day or two after receipt of this letter, I received a call from Mr. Joe Gyan, a reporter for the Baton Rouge Morning Advocate who inquired whether Justice Cole was going to recuse himself in this case. Mr. Gyan repeated to me some of the information

which was contained in Mr. Fontham's letter. The information which Mr. Gyan had was virtually identical to that contained in Mr. Fontham's letter.

I explained to Mr. Gyan that the letter had been filed as a letter. I further advised him that no motion for recusal of Justice Cole had been filed. If I can furnish you with any other information concerning this matter, please advise.

With warm personal regards, I remain.

Very truly yours,

/s/ Frans J. Labranche, Jr.
Frans J. Labranche, Jr.
Clerk of Court

FJLJr:wpb